

THE VIDEO ESSAY QUESTION: AN EXPERIMENT IN TEACHING PROFESSIONAL RESPONSIBILITY

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I. INTRODUCTION

Having from time to time made extensive use of audio-visual media in teaching Professional Responsibility, the idea occurred to me that it might be both interesting and useful to administer a final examination which included in part a video essay question. Rather than merely describing on paper a set of facts, why not show students a videotape of a simulated law office transaction between an attorney and clients which raised issues of ethics and professionalism in a true-to-life context? What better way could one test whether a student understood how the insights of the course should influence the practice of law? Intrigued by the idea, I offered it to my class as an option which individual students could elect in place of the regular printed essay component of the exam. To my great surprise, all 56 students rose to the challenge.

What follows is a brief description of the experiment¹ and of the students' reactions to it, along with some thoughts on the advantages and perils of this alternative testing format and its applicability to courses other than Professional Responsibility. At the outset, let me confess that my goal is not to footnote every sentence,² nor to produce the definitive work on the subject. All

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1. If the video exam format has been used elsewhere by another professor in a substantive law course (that is, one other than such performance-related courses as negotiation, counseling, courtroom advocacy, and the like), it has not come to the attention of the author or those with whom he has spoken.

2. There is support for the idea that there is more to scholarship than footnoting, and at the risk of being ironic, I have decided to cite this delightfully humorous

that I wish to do is to record the event, provoke some discussion, and perhaps entice a few adventurous law teachers to try the idea. Of necessity, many of the observations made herein are subjective in nature, rooted as they are in my own assessment of those goals which are appropriate to law school teaching, and in particular to a legal ethics class.

II. OBJECTIVES

There is, to be sure, the threshold question of what one might hope to gain by trotting such exotic fare into the solemn temple of the examination process. The reasons for using video in a testing context would seem to be somewhat distinct from those which might support its use in classroom teaching. Whereas in the latter case video can be employed to achieve greater clarity, vividness, variety, or speed in the presentation of substantive material,³ those concerns are relatively minor when it comes to evaluation. What may be important—particularly in a course on Professional Responsibility—is the opportunity the medium affords for drawing into the examination contextual and process-related considerations.

The video format allows the professor to bring to the examination a greater degree of verisimilitude to practice than would otherwise be possible. This quality of realism may be especially important in a Professional Responsibility course because students often relegate that class to a tier of secondary importance (behind such traditional subjects as evidence, procedure, and business associations), due in part to the fact that its aspirational nature gives it an air of idealism and impracticality. To the extent that students know that at the end of the semester they will be required to analyze and critique the actual performance of an attorney in relation to clients, rather than simply sort through a bizarre, written hypothetical, chock-full of improbable events, they will be on the alert to look for the connection between the content of the course and what will be expected of them in practice.

Of similar importance, the videotaped essay question better permits the professor to focus in the examination process on the interpersonal facets of lawyering. Much has been written on the topic of teaching students to be counselors as well as advocates and of sensitizing them to the affective as well as the cognitive and analytical dimensions of the practice of law.⁴ If one ac-

piece: Maher, *The Infernal Footnote*, 70 A.B.A. J. 92 (APRIL 1984).

3. See generally V. JOHNSON, MODERN MEDIA TECHNIQUES FOR THE LAW SCHOOL CLASSROOM: A PRIMER FOR LAW PROFESSORS, 2-3 (Program Handout of the Teaching Methods Section of the American Association of Law Schools, Annual Meeting, Washington, D.C., January 1985) (copy on file in the Sarity Kennedy East Law Library, St. Mary's School of Law, San Antonio, TX).

4. There are several noteworthy works on non-adversarial lawyering and humanistic legal education. E.g. BROWN & DAUER, MATERIALS ON NON-ADVERSARIAL LAWYERING (1977); T. SHAFFER & R. REDMOUNT, LAWYERS, LAW STUDENTS, AND PEOPLE, 15-33, 25-28 (1977); T. SHAFFER, LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL (1976); T. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER (1981).

cepts these insights into legal education as meritorious, and believes that it is an important course objective to encourage students to be humane and compassionate as well as professionally competent, then it makes pedagogical sense to give some scope to the same considerations in the evaluation of student performance.⁵ Students take seriously what they will be tested upon, and if "the exam tests the materials and skills emphasized during the course in some reasonable proportion to the emphasis given to them, most students will regard the exam as fair."⁶ A simulated law office transaction inevitably raises questions of whether, from an extra-legal, interpersonal standpoint, the attorney dealt with the clients well or poorly. Students should not be taught to overlook such matters. Indeed, if the legal profession is ever to overcome today's near ubiquitous charges of lawyer insensitivity and amorality in the popular media,⁷ it is precisely this concern that needs attention. One way to heighten law students' awareness of these issues in interpersonal justice is to integrate them into testing and evaluation. Students should be required to spot such issues of lawyering skill the same way they are expected to identify a problem involving the rule against perpetuities or the statute of limitations. Arguably such issues can be better raised by videotape than on paper since, among other things, the viewer can more readily discern the feelings and reactions of the participants.

Finally, closely related to the last point, and again of especial importance to a course in Professional Responsibility, a video final enables the tester to focus on the lawyer's role in the decisionmaking process. Was the lawyer paternalistic? Or did he unquestioningly agree to give the client what she wanted? Did he find it appropriate to raise moral questions bearing upon the client's proposed course of conduct? Or if the client was uncertain, how did he endeavor to move the client from a position of confusion and indecision to one of intelligent choice? These issues of legal counseling are appropriate, if not indispensable, to any course which purports to seriously consider the professional responsibility of attorneys. Yet it is often difficult to integrate them into a conventional printed examination since it is too lengthy a task to spell out in

5. "The most fundamental prerequisite of a test is validity." M. JOSEPHSON, *LEARNING & EVALUATION IN LAW SCHOOL* 6 (1984). To be valid, a "test must effectively measure student competence with respect to the various instructional objectives of the law teacher." *Id.* at 5. "Just as issue-spotting, problem-solving, and judgment abilities can be tested and evaluated without reference to [a] single right answer, attitudinal objectives can be similarly tested." *Id.* at 101. "There is no question that [functional] skills [such as those relating to interviewing and counseling] can be taught and evaluated but there are limitations within the traditional framework of large classes and paper and pencil testing." *Id.* at 102.

6. *Id.* at 32.

7. We are indeed in trouble when an establishment stalwart such as the Wall Street Journal runs a front page article boldly entitled: "Negative Verdict: Lawyer's Public Image is Dreadful, Spurring Concern by Attorneys" (October 11, 1983). The literature on the subject is voluminous. See, e.g., "Who's watching the lawyers?" San Antonio Express-News, p. 8-A, April 17, 1983.

writing the step-by-step dynamics of the law office interview. Indeed, much of the relevant information—e.g., the speaker's tone of voice, the timing of a response, a hesitation in speech—can be expressed only inadequately, if at all. In contrast, even a relatively short video segment can capture these important factors and present them in a way such that students are not left hopelessly uncertain as to what actually transpired.

Of course, it virtually goes without saying that a video exam can effectively raise as many substantive issues as could be included in an exam of the conventional format—particularly in view of the fact that law professors often preface an essay question by asking the student to assume that the facts which follow were learned in a client interview.

III. METHODOLOGY

The methodology of our experiment, which took place in December 1984, was relatively simple. The video essay question was the second and final part of a two and one-half hour examination. The first portion of the exam consisted of 25 multistate-format, objective questions, which the students were to work on before watching the video essay question. They were told in advance that 70 minutes into the examination the tape would be shown; that it would run about 15 minutes; and that they would therefore have approximately 65 minutes in which to write their essay. If the students completed the multiple choice section prior to the showing of the tape, they were permitted to begin reading a copy of the transcript of it which was furnished as part of the examination materials.⁸

The transcript served two purposes. First, it essentially insured that there would be no unnecessary distractions in the classroom by students idly waiting to view the film. Second, and more importantly, the transcript was calculated to relieve any unnecessary anxiety on the part of students that they might not be able to remember all of what they would hear. After viewing the segment, they could, if necessary, refer to the transcript to refresh their recollection of precisely what was said. Thus, in addition to having the benefit of seeing the

8. It might be less disruptive to the administration of the exam to place the video essay component first. Moreover, doing so could avoid any perception (or perhaps, more accurately, misperception) of unfair advantage which may result if students who finish the multiple choice early are permitted to begin reading a transcript of the tape supplied as part of the examination materials before the tape is shown. My decision to discount these benefits and place the video part second was based primarily on my experience with non-video examinations. I have found that some students inevitably misallocate their time and must rush to the finish line. My definite impression is that, while it may be possible to minimize the damage resulting from the misallocation if the second portion of the exam is an essay, it is virtually impossible to catch up on multistate-format, objective questions. The ideal solution might, of course, be to show the videotape first and then collect that portion of the answers so as to force students to devote an appropriate amount of time to the objective questions. Logistical problems concerning typing stations and multiple testing rooms made that infeasible in our case.

transaction, the students had full opportunity to follow the hoary admonition that before beginning to write, they should read and re-read the examination question.⁹

The tape which was shown was a law office vignette from the first of six films in the Dilemmas in Legal Ethics series, produced by the American Bar Association Consortium for Legal Education in 1977.¹⁰ Entitled "The Interviewing and Counseling Relationship," the videotape depicts a husband and wife in the law office of an old friend, asking him to represent them in obtaining a divorce. In the course of the film, it becomes apparent that despite the couple's expressed preference for joint representation, there is a definite conflict of interest as to child custody and financial arrangements, which seems incapable of resolution in view of the visible, though in part un verbalized, tensions between the parties. There are questions of whether the attorney fully advised the couple of the risks of joint representation or explored alternative courses of action. In addition, more subtle issues are raised concerning the attorney's present representation of the husband's employer in business matters, the disclosure of confidences of that party, fabrication of evidence in connection with the divorce, possible income tax fraud by the couple which might undercut the financial basis for the divorce, and the structure and amount of the attorney's fee.

This tape, which along with the others in the series is frequently used in Professional Responsibility courses as a basis for class discussion,¹¹ seemed to work well as an examination question. It posed a significant number of important problems relating to the law of lawyer regulation, while at the same time affording better students a realistic opportunity to also explore critical philosophic assumptions underlying the practice of law (e.g., the lawyer's role in selecting a course of action or protecting the interests of third parties, such as the couple's children). The physicalized emotions of the parties conflicted sufficiently with their verbal statements to make the interview especially interesting. And the attractive setting in which the events took place and the professional demeanor of the well-dressed attorney apparently served as a legitimate

9. Irving Younger puts it forcefully in a videotape now made available to first-year students at many law schools:

Don't pick up your pen and pencil! The temptation is virtually irresistible to start to write at once because, of course, you've got a time limitation . . . [I]f you yield to that temptation you are doomed; you cannot do well on that examination. If need be, sit on your hands . . . Rule of thumb: whatever time you are given for that problem . . . half the time should be spent preparing to write and the other half actually writing.

NATIONAL PRACTICE INSTITUTE, *HOW TO TAKE, AND PASS, A LAW SCHOOL EXAM* (1983).

10. The tapes have been available in two formats. One includes only the dramatized vignettes. The other features the vignettes followed by a lengthy roundtable discussion of the issues and problems raised by the film.

11. In fact, one fine textbook is used in conjunction with at least three of the films M. SCHWARTZ & R. WYDICK, *PROBLEMS IN LEGAL ETHICS* (1983).

diversion. Some students seemed to find it difficult to criticize, let alone stigmatize as unethical, the conduct of a person who looked more like a well-educated businessman rather than an incompetent shyster.

Other tapes in the Dilemmas series might serve equally well as the basis for an examination question, though some are more limited in the scope of issues raised.¹² Naturally, it might be risky for a professor to rely on films from the series more than once, even in different years, if the tapes are readily accessible to students as part of the law school's library collection.¹³ It is not difficult to picture an aggressive student checking out and watching all of the films in the hope of stumbling upon what may be the video final and thereby gaining a competitive edge.

There is always, however, the option of producing an original video. While undoubtedly a creative challenge, the task of writing a script for a law office transaction should, in many respects, not be any more formidable than drafting a good exam. In either case, attention must be paid to legal issues, factual details, and, to a greater or lesser extent, statements by the participants. The difficulty, if there is one, may be in finding the right actors and filming the event. In many instances, however, the university's theater department, learning resources center, or audio visual department may be able to provide necessary assistance. Even if the production involves greater planning than would a regular exam, it may be an excellent investment of time and effort. If done well, *students will appreciate and benefit from the project*, and the film can be retained as part of the law library's permanent collection, so that it can be used to assist students in exam preparation in future years.

IV. STUDENT REACTION

At the risk of running afoul of the maxim that "all research corrupts, but empirical research corrupts absolutely,"¹⁴ I solicited student reaction to the video final. I wanted their candid assessment of whether or under what conditions I should ever again use this form of testing. To provide this information,

12. Two that particularly come to mind as attractive candidates are those entitled "Negotiation" and "Counseling." The former raises issues of attorney incompetence, communications with opposing parties, tactics in negotiations, and duty to report unethical conduct. The latter involves obligations of corporate counsel, duty to withdraw, delay of litigation, and statements to opposing counsel.

13. Indeed, the risk is all the greater in view of the fact that the videotapes were originally published with a set of discussion guides which, in addition to containing transcripts of the dialogues, identify many of the issues and cite to ABA opinions and provisions in the Model Code of Professional Responsibility bearing upon their resolution. Another booklet published more recently by the ABA provides appropriate references to the new Model Rules of Professional Conduct: *LEGAL ETHICS: APPLYING THE MODEL RULES* (1984).

On the other hand, use of one of the tapes for a video final on a single occasion may heighten class attention in future years when any of the tapes are used in class, since students dependably hand down information from year to year.

14. Bok, *A Flawed System*, HARVARD MAGAZINE 38, 44 (May-June 1983).

the students were told at the beginning of the exam that when time was called, they would be given five additional minutes to write comments on the back of their blue books. Assurances were duly given that their opinion on the video final would in no way influence their grade, and I have no reason to think that any of the students distrusted that assurance.¹⁵

Forty-six of the 56 students commented on the experiment. Some briefly (e.g., Video si!) and others at considerable length. Aside from the fact that many of the students felt pressed for time (which tends to be the case regardless of the type of exam I give), the reaction was overwhelmingly positive. In an admittedly imprecise attempt to categorize the answers, my research assistants and I recorded and grouped the comments under four headings: very favorable; favorable; unfavorable; very unfavorable.¹⁶ As the following table indicates, an impressive 85% of those responding favored the use of a video final in the Professional Responsibility course:

<i>Response</i>	<i># of Students</i>	<i>Percentage</i>
Very Favorable	16	34.8%
Favorable	23	50.0%
Unfavorable	3	6.5%
Very Unfavorable	<u>4</u>	<u>8.7%</u>
Total	46	100.0%

Although the comments on the video exam were not read until after the blue books had been graded, I did note, in the course of compiling and categorizing the comments, the essay point totals which had been earned by the various students. My objective was to determine whether the video format had been viewed favorably only by those students who, in fact, did well on the essay. In this regard, no clear pattern emerged. While many of the students who did well on the exam favored the use of a video essay question, some of those who were among its strongest supporters did comparatively poorly.¹⁷

15. My experience with these students—having taught many of them for two or three consecutive semesters—leads me to believe that it is likely their answers would have been exceptionally frank. We experimented in the professional responsibility course with various forms of team teaching, collaborative projects, guest speakers, audio-visual media, and reading selections, and the students never seemed to be at all reluctant to indicate what they did nor did not like. Moreover, even assuming that some of the students may have wrongly thought it advantageous to applaud their professor's efforts at creative testing despite true feelings to the contrary, the figures are still very encouraging for further experimentation of this variety.

16. Copies of the comments are available from the author.

17. For example, one student who received the equivalent of a high D on the essay portion wrote: "I thought the videotape was very beneficial; it allowed us to see the facts dramatized and visualize some of the major problems." Another whose essay earned a low C commented: "The video was an excellent idea. How else are students . . . going to understand the needs for the interpersonal aspect of lawyering? We probably could see all this happening to us. . . . The skills of negotiation and compromise

Conversely, at least a few who scored highly were unenthusiastic.¹⁸ The only conclusion I can safely draw is that not everyone who expressed a favorable opinion did especially well, for clearly 85% of the students did not receive above average grades.

As is often the case, some of the best observations on the experiment were those made by the students. Here are just a few:

Unlike the written exam, the video exam is a truer application of real lawyering. In a video exam there is more importance placed on non-verbal things that an attorney must be able to pick up and relate to if he is to be successful. [A] great break from the doldrums of normal exams.

[The] videotape was great. Whenever you observe an episode, it sinks in much faster than having to read it.

Good idea. It put me a little more at ease than I would have been.

The videotape was useful for setting a pace for reading the fact situation. It also provides a nice break. Use it again.

[S]omething we can really relate to in practice. . . .

The video exam of course is more helpful than the written transcript since you can see that there is more push by the attorney. It probably leaves room for less interpretation (differing viewpoints) about what is happening. . . .

[A] unique and useful change of pace for testing.

Relieves the tension of constant reading.

I retained the images and voices, making it easy to keep the issues in mind. I found myself watching the [transcript] page more than the video, but the video brought the words . . . into vivid perspective. I vote for video exams on a limited basis (not 100% of the test).

[H]elps a student see how problems actually occur in the real world, and is much better than an examination which has things happening which would never occur.

It made the parties seem more real and also gave some of the [printed] dialogue a different meaning.

I would do it again.

V. CONCLUSION

There is no reason why a video final could not successfully be employed in courses other than Professional Responsibility. In Torts, for example, the film might depict an accident victim or his survivors explaining to the attorney the events which led to the injuries. In Contracts, a merchant might be shown seeking legal advice as to his rights under the terms of an agreement. Courses traditionally taught during the second and third years may be particularly ripe for such experimentation in view of the fact that students at that stage of their

are more important today than the skills of the rules of evidence."

18. The student who wrote the second best essay and tied for the highest grade in class observed simply: "The videotape was *not* useful." Another, whose essay was closer to the middle range, advised: "Bag the video. It did me no good whatsoever. Too long. Too many issues. Also, too many subtle issues which were very well hidden."

legal education frequently complain of boredom and ennui.

"Great teaching," it has been said, "requires great enthusiasm,"¹⁹ and the same is undoubtedly true of great testing. The video final offers each of us the bright promise of a fair opportunity to channel our enthusiasm in a way that may produce better results tomorrow than we were capable of yesterday.

19. Baier, *What Is the Use of a Law Book without Pictures or Conversations?*, 34 LEGAL EDUC. 619, 619 (1984).